Supreme Court, U.S.
FILED
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(3)

NO: 91-124
IN THE SUPREME COURT OF THE UNITED STATES

ROBERT FRANCIS SWOYER,
Petitioner

Versus

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

ANSWER IN OPPOSITION TO RESPONDENT'S APPLICATION FOR AWARD OF DAMAGES

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QUESTION

WHETHER OR NOT RESPONDENT IS ENTITLED TO AN AWARD OF DAMAGES AGAINST PETITIONER AND PETITIONER'S ATTORNEY WHERE:

1) PETITIONER'S PETITION FOR A WRIT OF CERTIORARI INVOLVES AN IMPORTANT FEDERAL CONSTITUTIONAL ISSUE;

2) ONE OF THE THREE COMMONWEALTH JUDGES FOUND THAT FEDERAL JUDGES THINK THAT THEIR CASES TAKE PRIORITY UNDER THE SUPREMACY CLAUSE, BUT THEY ARE IN ERROR; AND

3) RESPONDENT'S HAVE OFFICIALLY REQUESTED THAT THE APPELLATE COURT OFFICIAL REPORT IS OPINION ON THE SUPREMACY CLAUSE BECAUSE OF THE LANDMARK IMPORTANCE OF PETITIONER'S FEDERAL CONSTITUTIONAL ISSUE WHICH OPINION RESPONDENT STATES WAS THE FIRST APPELLATE DECISION ON THIS SIGNIFICANT ISSUE?

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REASONS WHY RESPONDENT'S APPLICATION FOR AWARD OF DAMAGES SHOULD NOT BE GRANTED

Petitioner herein incorporates the Concise Statement Of The Case in his Petition for Writ of Certiorari. Respondent has moved the state court to publish its landmark decision which is the subject of the Petition for Writ of Certiorari holding that an attorney's state court action may be dismissed on the merits in the attorney's absence if the attorney cannot appear in state court due to the fact the attorney is simultaneously appearing in Federal Court. Penndot vs. Swoyer, ____ Leh. C.P. ____, affirmed ___ Cmlth Ct. ____, ____ A2d. _____, allocatur denied, ____ Pa ____, ____ A2d. ____ (1991), (See Commonwealth Decision in Appendix A, page 9). Apparently, attorneys are desirous of having the Commonwealth Court Opinion officially reported so they can

use it in State Court proceedings to argue that the Supremacy Clause does not give the Federal Judiciary Priority in scheduling. Hence, every time an attorney has a schedule conflict between State and Federal Court appearances, Respondent will use said opinion to proceed to dismissal of the State Court action. See, Respondent's Application to Report Unreported Opinion attached as Appendix B 24 where the Respondent tells Commonwealth Court that its opinion is an important determination which is the first case of its kind decided by a State Court in Pennsylvania.

Despite the patent contradiction, Respondent simultaneously has applied to this Honorable Court for attorney fees against Petitioner claiming that Petitioner's appeal is "frivolous" whereas in Commonwealth Court it argues that it is

an important case of first impression going State Court scheduling matters priority over Federal Cases.

Respondent has mischaracterized the facts in its argument in support of its application for Award of Damages. Specifically, the trial court addressed Petitioner's motion to present discovered evidence on the merits without Petitioner or his counsel present, and without an opportunity to be heard, and decided the case on the merits. Respondent has mischaracterized the facts in its agreement in support of its application for Award of Damages. The Honorable John E. Backenstone never addressed the issue of subject matter jurisdiction. To the extent Respondents have otherwise misstated the procedural history, the record speaks for itself. For the reasons set forth below, Respondent's Application

for Damages ought to be denied.

A frivolous argument is one that cannot conceivably persuade the court. United States v. Edwards, 777 F.2d 364, 365 (7th Cir. 1985). Here, Petitioner's argument could not only conceivably persuade the court, but if the Petitioner fails, the Supremacy Clause will be turned on its head and State Court proceedings must take priority over Federal Court proceedings in the in the Commonwealth of Pennsylvania. Hence, Respondent's application for damages ought to be denied.

1. One of the three Pennsylvania appellate judges deciding Petitioner's appeal, specifically found that Petitioner's federal constitutional claim is not frivolous.

In the opinion by the Commonwealth

Court concerning the merit of Petitioner's appeal, Judge Pellegrini stated,

> **"On that ground, Swoyer argues that if counsel is required to appear in Federal and State Courts simultaneously, counsel is bound to attend the Federal matter. While I believe that this contention is erroneous, so many Federal Judges believe this to be true, how can it be frivolous?"**

Judge Pellegrini aptly summarized the contradiction: in Pennsylvania, Federal Judges take priority over State Court proceedings. State Court Judges, however, are now on record for the opposite proposition.

Accordingly, Petitioner's appeal is not "one that cannot conceivably persuade the court." U.S. v. Edwards, infra. Hence, Petition appeal to this Honorable Court is not frivolous. Id.

2. Petitioner's Petition for a Writ of Certiorari involves a substantial Federal question.

The Petitioner contends that the Pennsylvania Court's erroneously interpreted and applied the Supremacy Clause of the United States Constitution. Article VI d. 2 of the U.S. Constitution. For the reasons set forth at length (and incorporated herein in Petitioner's Petition for Writ of Certiorari) Petitioner's petition involved an important Federal Question and is not frivolous.

Additionally, although Respondent was not so required, Respondent chose to file a Brief in opposition to Petitioner's Petition for a Writ of Certiorari because of the significance of Petitioner's appeal. If Petitioner's appeal truly was frivolous, why did Respondent voluntarily

incur expenses responding to the merits? Respondent, through its actions before this Court, and in filing Application To Report Unreported Opinion indicates that this is a significant case which will impact on the authority of Federal Courts to control its docket. By its actions, Respondent has acknowledged that Petitioner's Petition for Writ of Certiorari is not frivolous.

2. Respondent has admitted that Petitioner's appeal involves an important Federal question on which no Pennsylvania appellate decision existed.

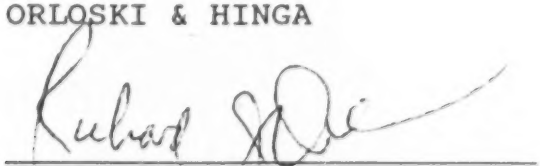
On or about September 25, 1991 Respondent filed an Application to Report Unreported Opinion of Commonwealth Court of Pennsylvania. A true and correct copy of Respondent's Application is attached hereto as Appendix B (See 24).

Respondent's aforesaid application acknowledges that Petitioner's appeal raised an important Federal question Appendix B, 24. Further, Respondent notes that no Pennsylvania appellate decision existed on the issue which is the subject of Petition for Writ of Certiorari. Petitioner's appeal of the unprecedented, landmark decision involving the Supremacy Clause is not frivolous. Hence, Respondent's Application for Damages ought to be denied.

CONCLUSION

For the foregoing reasons, Respondent's Application for Award of Damages ought to be DENIED.

ORLOSKI & HINGA



Richard J. Orloski
Attorney for Petitioner

APPENDIX A: OPINION OF COMMONWEALTH COURT

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RONALD FRANCES SWOYER, Appellant	:	
	:	NO.
	:	2062 C.D 1989
vs.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Appellee	:	

BEFORE:

HONORABLE JAMES CRUMLISH, JR.,
President Judge

HONORABLE DAN PELLEGRINI,
Judge

HONORABLE SILVESTRI SILVESTRI,
Senior Judge

SUBMITTED ON BRIEFS: March 30, 1990

OPINION NOT REPORTED

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RONALD FRANCES SWOYER, Appellant	:	
	:	NO.
	:	2062 C.D 1989
vs.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Appellee	:	

ORDER

AND NOW, this 10th day of September, 1990, the decision of the Court of Common Pleas of Lehigh County denying continuance and dismissing the Motion for Rehearing of Appellant is hereby affirmed, and the case remanded for determination of the amount of counsel fees and costs to be awarded to Appellee, Department of Transportation. Jurisdiction relinquished.

MEMORANDUM OPINION BY

SENIOR JUDGE SILVESTRI

FILED: Sept. 10, 1990

Ronald Francis Swoyer (Swoyer) appeals from the October 5, 1989 order of the Court of Common Pleas of Lehigh County (trial court) denying his request for a continuance and dismissing his Motion for Rehearing on Grounds of Newly Discovered Evidence (Motion for Rehearing) of his appeal from an order of the Department of Transportation (Department) suspending his operating privileges.

The events giving rise to the present appeal are as follows. Swoyer's operating privileges were suspended by the Department for one year for his refusal to submit to chemical testing pursuant to

Section 1547 of the Vehicle Code.[1]

On or about October 7, 1987, Swoyer appealed the order suspending his operating privileges to the trial court. A hearing was held on January 15, 1988 at which the trial court determined that Swoyer had refused to take the breathalyzer and issued an order, on the same date, denying his license suspension appeal. Swoyer never filed an appeal from the January 15, 1988 order of the trial court.

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[1]Section 1547(b) of the Vehicle Code, 75 Pa. C.S. Section 1547(b), in pertinent part provides:

> (b) Suspension for refusal.--
> If any person placed under arrest for a violation of Section 3731 (relating to driving under influence of alcohol or controlled substance) is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person for a period of 12 months.

Subsequently, on December 23, 1989, new counsel for Swoyer filed a Motion for Rehearing of his appeal based upon newly discovered evidence. The newly discovered evidence involved a discrepancy between testimony of the breathalyzer operator at the license suspension hearing and the criminal trial on drunk driving at which Swoyer was found not guilty. The trial court ordered a hearing on Swoyer's December 23, 1988 Motion for Rehearing based upon this newly discovered evidence. The hearing was scheduled for January 31, 1989.

By order of the trial court dated October 5, 1989, Swoyer's fourth request for a continuance of the hearing was denied and his Motion for Rehearing on his

January 15, 1988 appeal was dismissed.[2]

As previously indicated, Swoyer's Motion for Rehearing based upon newly discovered evidence was originally scheduled to be heard by the trial court on January 31, 1989. On January 26, 1989, Swoyer's counsel requested a continuance because of a baptism.[3] The continuance was granted and the hearing rescheduled until March 13, 1989, at which time an additional continuance was requested by

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[2]On January 23, 1990, the Department filed a motion to quash the within appeal as untimely contending that the dismissal of Swoyer's license suspension appeal by the trial court occurred on January 15, 1988. The Department's motion also included a request for counsel fees.

This court denied the Department's motion to quash on February 21, 1990 on the basis that this appeal was not from the January 15, 1988 order but from the trial court's October 5, 1989 order which was a final, appealable order. (See Memorandum opinion filed February 21, 1990).

[3]Official Record, Item No. 9.

Swoyer's counsel because his appearance in federal court was warranted.[4] This continuance was also granted and the hearing rescheduled until April 6, 1989 with the proviso by the trial court "[n]o further continuances to be granted."

Both the record and paper file are then devoid of any documents or entries indicating what transpired between the scheduled April 6, 1989 hearing and August 9, 1989 when a third continuance was requested by Swoyer's counsel for Swoyer was again made on the basis that he had to appear in federal court.[5] The trial court continued the hearing until October 5, 1989, and again stated: "No further continuances to be granted." On October 5, 1989, another request for continuance was

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[4]Official Record, Item No. 10.

[5]Official Record, Item No. 11.

made by an associate of Swoyer's counsel who indicated that counsel was again in federal court.[6]

We are now requested to review the trial court's denial of Swoyer's request for a continuance and dismissal of the Motion for Rehearing.[7] Hence, the only issue before us is whether the trial court abused its discretion.

In support of the argument of an alleged abuse of discretion by the trial court, Swoyer contends that the refusal of the trial court to grant a continuance contravenes the spirit of the Supremacy

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[6]No document requesting a continuance on October 5, 1989 appears in the record.

[7]Our scope of review is limited to a determination of whether the trial court's findings are supported by competent evidence, whether an error of law has been committed, and whether the trial court's decision constitutes a manifest abuse of discretion. Waigand v. Commonwealth, 68 Pa. Commonwealth Ct. 541 449 A.2d 862 (1982).

Clause of Article VI, Section 2, of the United States Constitution which provides, inter alia, that federal law supersedes any inconsistent state rules or laws. U.S. Constitution Art. VI, Section 2. Swoyer argues that as counsel was required to appear in federal and state court simultaneously, counsel was bound to attend the federal court matter. We find this argument to be frivolous and lacking in merit.

Similarly, we find Swoyer's argument that counsel's scheduling conflict was not so inexcusable as to warrant dismissal and refusal to grant the continuance, to be without merit. Pa. R.C.P. No. 216(A)[8]

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[8]We are cognizant of the Supreme Court's recent decision in re Westinghouse Electric Corp., _____ Pa. _____, _____ A.2d _____ (31 and 32 W.D.A.D. 1989, filed May 23, 1990); however, we rely upon Rule 216 as it may assist a trial judge in exercising discretion when presented with a request for continuance.

recognizes four grounds for continuance, which are:

> (1) Agreement of all parties or their attorneys, if approved by the Court;
>
> (2) Illness of counsel of record, a material witness, or a party...;
>
> (3) Inability to subpoena ... any material witness...;
>
> (4) Such special ground as may be allowed in the discretion of the court.

Request for a continuance based upon counsel's appearance in federal court obviously is encompassed within special ground category number four. Hence, it is discretionary.

That granting of a continuance lies exclusively within the discretion of the trial court is well-established. Chester Housing Authority v. Nicholas, 329 Pa. Superior Ct. 136, 477 A.2d 1391 (1984). Such a determination by the trial court will not be disturbed absent an apparent

abuse of discretion. Phoenix Mutual Life Insurance Co. v. Radcliffe on the Delaware, Inc., 439 Pa. 159, 266 A.2d 698 (1970); Walasavage v. Marinelli, 334 Pa. Superior Ct. 396, 483 A.2d 509 (1984).

The record evidences no abuse of discretion by the trial court. In fact, it reflects the trial court's granting of continuances on a number of occasions in an attempt to accommodate Swoyer's counsel.

Furthermore, Pa. R.C.P. No. 216(B) provides:

> [e]xcept for cause shown in special cases, no reason.. enumerated for the continuance of a case shall be of effect beyond one application made in behalf of one party....

On three separate occasions counsel's excuse for requesting a continuance was his appearance in federal court. Such

repeated requests contravene this rule.

Rule 216 is meant to prevent granting of repeated continuances. In this case, three documented continuances were granted; the trial court gave counsel two warnings that "no further continuances" were to be granted; and, hence, was justified in denying the fourth request for a continuance.

We now turn our attention to consideration of the Department's request for counsel fees. The Department contends that Swoyer's appeal is frivolous and requests an award of counsel fees pursuant to Pa. R.A.P. 2744. A key factor in the determination of whether or not an appeal is frivolous involves a decision as to whether, as a matter of law or fact, appellant's contentions have any likelihood of success or whether continuation of the contest is reasonable.

Wenger v. Common wealth of Pennsylvania, 107 Pa. Common wealth Ct. 20, 527 A.2d 1071 (1987). Under the circumstances of this case, an award of counsel fees to the Department under Pa. R.A.P. 2744 is warranted. Hence, we remand, on this issue alone, to the trial court for a factual determination of the amount of counsel fees and costs.

As we find no abuse of discretion by the trial court in refusal to grant Swoyer's request for continuance or in dismissal of Swoyer's Motion for Rehearing, the order of the trial court is affirmed and the case remanded for a determination of the amount of counsel fees and costs to be awarded.

SILVESTRI SILVESTRI, Senior Judge

CONCURRING AND DISSENTING OPINION
BY JUDGE PELLEGRINI
FILED: September 10, 1990

I concur in the affirmance of the trial court's denying continuance and dismissing the motion for a rehearing, but dissent as to the awarding of counsel fees because the appeal is frivolous.

For counsel fees to be awarded on appeal as to whether, as a matter of law or fact, Swoyer's contentions have no likelihood of success and continuation of the contest is unreasonable. Wenger v. Common wealth of Pennsylvania, 107 Pa. Cmwlth Ct. 20, 527 A.2d 1071 (1987).

Swoyer raises the issue that it was an abuse of discretion for the trial court not to grant a continuance for it contravenes the Supremacy Clause of Article VI, Section 2 of the United States Constitution. On that ground, Swoyer

argues that if counsel is required to appear in federal and state courts simultaneously, counsel is bound to attend the federal court matter. While I believe that this contention is erroneous, so many federal judges believe this to be true, how can it be frivolous?

More to the point, I do not believe that Pa. R.A.P. 2744 authorizes the imposition of counsel fees against a party where the substance of the matter on appeal involves conduct of his counsel rather than that party's interest. Pa. R.A.P. 2744 is not broad enough, and absent a provision in the Appellate Rules similar to that contained in Section 8355 of the Judicial code, 47 Pa. C.S. Section 8355, counsel fees cannot be awarded against the attorney.

For the foregoing reasons, I dissent.

DAN PELLEGRINI, JUDGE

APPENDIX B: RESPONDENT'S APPLICATION TO REPORT UNREPORTED OPINION

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RONALD FRANCES SWOYER, Appellant	:	
	:	NO.
	:	2062 C.D 1989
vs.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Appellee	:	

APPLICATION TO REPORT UNREPORTED OPINION

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

NOW COMES the Department of Transportation, Bureau of Driver Licensing, that, by and through its attorney, Timothy P. Wile, Esquire, respectfully applies to this Honorable Court to amend its order and memorandum opinion to the three-judge panel in this case be reported and avers the following in support thereof:

1. Appellant Swoyer's operating privilege was initially suspended by the Department for one year under the implied consent law, 75 Pa.C.S. §1547.

2. Appellant Swoyer's appeal to the Court of Common Pleas of Lehigh County, under 75 Pa.C.S. §1550, was denied by the Common Pleas Court in January 1988.

3. In December 1988 Appellant Swoyer filed a post-trial motion seeking a re-hearing or new trial of his implied consent law suspension.

4. The common pleas court granted Appellant Swoyer four continuances of a hearing on that motion before it denied a fifth continuance and dismissed the post-trial motion in October 1989.

5. Appellant Swoyer appealed the dismissal of his post-trial motion for rehearing to this Honorable Court.

6. On September 10, 1990, a three-

judge panel of this Honorable Court affirmed the decision of the Court of Common Pleas of Lehigh County and granted the Department's Application for Sanctions under Pa.R.A.P. 2744 by a memorandum opinion. A copy of that opinion is attached as Exhibit A.

7. Subsequent to this Honorable Court's unpublished decision in this case, the Pennsylvania Supreme Court denied Appellant Swoyer's petition for allowance of appeal.

8. Appellant Swoyer has pending a Petition for a Writ of Certiorari with the United States Supreme Court at Docket No. 91-124, to which the Department has filed a brief in opposition and an application for sanctions under Supreme court Rule 42.2.

9. The major issue decided in the panel's opinion is whether the Supremacy

Clause of the Federal Constitution, U.S. Const., Art. VI, cl.2, requires a Pennsylvania Court to automatically grant a party a continuance where the party's counsel has a scheduling conflict requiring counsel to appear in Federal Court. This court held that U.S.Const. Art. VI, cl. 2, does not mandate that an attorney's scheduling conflict with a Federal Court appearance requires a state trial court to grant that attorney a continuance of the state court matter. This court also ruled that Appellant's appeal was frivolous and granted the Department sanctions under Pa. R.A.P. 2744.

10. This analysis contained in Court's opinion in this case is well reasoned, sound and thoughtful. In researching this matter for the brief in opposition to Appellant Swoyer's petition

for certiorari in the United States Supreme Court, the Department has been unable to find any Pennsylvania appellate decision that sets forth the holding handed down by this court in its September 10, 1990, unreported opinion. Therefore, the holding in this case, if the opinion is published, will provide significant additional clarification in this area of the law and provide much needed guidance to both the bench and bar of this Commonwealth.

11. This Court's opinion in this case will be given added significance since it is being reviewed by the United States Supreme Court when that Court decides whether to grant or deny Swoyer's Petition for Writ of Certiorari.

12. Unless this opinion is reported, it may not be cited in any brief, argument or opinion, except that any opinion filed

in the same case may be cited as representing the law of the case. 210 Pa.Code §67.55.

WHEREFORE, the Department of Transportation, Bureau of Driver Licensing, respectfully requests that this Court's unreported opinion in Swoyer v. Department of Transportation, No. 2062 C.D. 1989, filed September 10, 1990, be designated as an opinion to be reported.

Respectfully submitted,

Timothy P. Wile
Assistant Counsel-in-Charge
Appellate Section
Attorney I.D. No. 30397

Attorney for Appellee

APPENDIX C: ORDER OF SUPREME COURT OF PENNSYLVANIA

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

May 6, 1991

Dear Counsel:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above Captioned matter:

May 2, 1991 Petition Denied.

Per Curiam.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the foregoing document upon the following person(s) by depositing same in the United States mail, regular, first-class mail, postage prepaid, addressed as follows:

This 5 day of October, 1991.

ORLOSKI & HINGA

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